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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 531

PEORIA HOUSING AUTHORITY,
Petitioner,

v.

SECURITY INSURANCE COMPANY, ET AL.,
AND MAX EDLIN AND IDA EDLIN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES T. MCNELIS,
412 Fifth St., N. W.,
Washington, D. C.

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Peoria Housing Authority, a municipal corporation organized under the laws of Illinois, and which constructs and maintains low-rent housing projects with Federal funds obtained by virtue of loan and contribution contracts with the United States Public Housing Administration, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on June 4, 1959.

Opinions Below

The opinion of the Court of Appeals (Appendix, *infra*, p. 14-20) is reported at 269 F. 2d 159, while an opinion of

the United States District Court for the Southern District of Illinois, Northern Division (App. 70-74),[1] which was affirmed in part and reversed in part by the Court of Appeals, is found at 160 F. Supp. 487.

Jurisdiction

The judgment of the Court of Appeals was entered June 4, 1959 (Appendix, *infra*, p. 21), and became final on August 17, 1959, when the Peoria Housing Authority's petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C.A. sec. 1254(1).

Question Presented

Whether a condemnor which has paid the value of buildings as part of the award made for land which was valued in its condition at the date of filing condemnation proceedings has a right by subrogation to recover from the former landowners the proceeds of fire insurance policies payable as a result of a fire occurring after the proceedings were filed.

Statement

In the District Court the issues in the case were resolved on the pleadings (App. 68, 69, 70), which reveal uncontroverted facts that may be summarized as follows:

Prior to September 3, 1952, Max and Ida Edlin, plaintiffs, were the owners of a building in Peoria, Illinois, and the real estate upon which it was located, the said building being insured by five companies, the defendants, for varying amounts totaling $24,000 (App. 3, 11). On that date the Peoria Housing Authority, pursuant to the laws of

[1] The Appendix to plaintiffs-appellants' brief in the court below will be cited "App.——."

Illinois filed a petition to condemn the property (App. 22). The petition set forth the Authority's organization, authority, purpose and contractual obligations with the United States Public Housing Administration and alleged that the Edlin property was required for the furtherance and completion of a project, financed solely by funds of the Federal government (App. 34), having the dual public and emergency purpose of slum clearance and providing needful low-rent housing (App. 22-35). Before the condemnation petition could be heard, namely on November 21, 1952, and while the fire policies issued to the Edlins were still in force and effect, the building was totally destroyed by fire, the loss sustained amounting to more than the aggregate sums of all the policies (App. 3, 4).

Subsequently, at a trial in the condemnation proceeding commencing on January 6, 1953, and terminating January 20, 1953, a jury fixed $43,500 as the fair cash market value of the Edlin premises, including the real property and improvements thereon, at its highest and best use, as of September 3, 1952, when the condemnation petition was filed (App. 17, 18).[2] Pursuant to an order of the county court entered on the verdict, the Authority paid the Edlins $43,500 from the Federal funds allocated to the project (App. 18, 34).

On October 2, 1953, the Edlins filed a complaint in the District Court, based upon diversity of citizenship, seeking to recover the proceeds of the fire policies from the defendant companies (App. 2-5). The latter answered, alleging,

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[2] By force of the Illinois Eminent Domain Act (Ill. Rev. Stat. 1951, chap. 47; see Appendix C, *infra*, p. 22), as construed in *Sanitary District of Chicago* v. *Chapin*, 226 Ill. 499, 80 N.E. 1017; *Eckhoff* v. *Forest Preserve District*, 377 Ill. 208; 36 N.E. 2d 245, and others, the value of property sought to be condemned is to be determined as of the date of the filing of the petition, without regard to any increase or decrease in the value of the property between that date and the date of trial, or the date of judgment or the date of payment.

among other things, that the Edlins had sustained no pecuniary loss or damage by reason of the fire, because of the condemnation proceedings and the Edlins' receipt of $43,500 for their property from the Authority (App. 53-54). The District Court agreed with this defense and dismissed the cause (160 F. Supp. 487, App. 70); the Court of Appeals, relying upon *First National Bank of Highland Park* v. *Boston Insurance Co.*, 17 Ill. 2d 147, 160 N.E. 2d 802 (adopted on May 22, 1959, while this cause was pending in the Court of Appeals), reversed the District Court holding that the contracts of insurance were personal to the Edlins and that the latter, as holders of the legal title, possessed a legal interest in the property destroyed and that they became entitled to the proceeds of the policies (269 F. 2d 159).

Upon leave granted by the District Court (App. 59), the Peoria Housing Authority had become an intervenor in the cause, and filed a complaint agreeing that the Edlins had suffered a pecuniary loss under the policies, but praying for a determination that the proceeds of the policies be held for the use and benefit of the Authority by virtue of the fact that the buildings destroyed were a part of the premises condemned and for which the Authority had paid the Edlins $43,500 (App. 1021). Consistent with its view that the Edlins had suffered no pecuniary loss which entitled them to recover under the policies, the District Court found that the Authority could not assert a right by way of an equitable subrogation, adding that: "In the event the Edlins recover then the intervenor could and should have their day in court" (160 F. Supp. 487 at 490; App. 74). The Court of Appeals, without mention or consideration of the equitable principles urged upon it, permitted the Edlins to recover on the policies, but, concluded: "* * * the Authority has no legal claim to the proceeds of the policies in this case" (269 F. 2d 159, at 163).

Reasons for Granting the Writ

1. Subrogation, it has been said on the basis of authorities collected at 83 C.J.S., pp. 580-583, is an equitable doctrine, not a legal right, the purpose of which is to promote and accomplish justice and to prevent injustice. It rests on the principle that substantial justice should be obtained regardless of form, that is, its basis is the doing of complete, essential and perfect justice as to all parties without regard to form.

The scope of the doctrine is perhaps best demonstrated by the following comment taken from 83 C.J.S., pp. 590-591:

> The doctrine of subrogation, under the initial guidance of Chancellor Kent, has applied much more extensively in American than in English jurisprudence. The doctrine is much encouraged and protected. It is a remedy which is highly favored and is not so restricted in its application as formerly. The courts are inclined to extend rather than restrict the principle so that, although formerly the right was limited to transactions between principals and sureties, now it is broad and expansive and has a liberal application. It is no longer confined to cases of suretyship, but the doctrine has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons, the principle being modified to meet the circumstances of cases as they have arisen. So the mere fact that the doctrine of subrogation has not been previously invoked in a similar situation is not a *prima facie* bar to its applicability.

Unlike the Court of Appeals in the present case, Federal Courts upon numerous occasions have accepted, expanded and applied the equitable concepts of subrogation to ac-

complish justice, to do equity, and to prevent unjust enrichment. In *American Surety Company* v. *Bethlehem National Bank*, 116 F. 2d 75 (C.A. 3) where the court permitted a surety to share in a distribution of the assets of an insolvent national bank, it was stated (p. 76) that subrogation is not an inflexible legal concept but is simply an exercise of equitable powers that will be carried out in the exercise of a proper equitable discretion, with due regard to the legal and equitable rights of others. Again, in the case of *In re Bildice Co.*, 146 F. Supp. 911 (N.D. Ill.), in permitting applying the doctrine of subrogation to permit a surety to share in the distribution of assets with creditors the court said: "The allowance of subrogation is governed by the principles of equity and good conscience." In the case of *Old Colony Insurance Co.* v. *United States*, 168 F. 2d 931 (C.A. 6), where an insurer of an automobile which collided with an Army vehicle was held to be subrogated to the claim of the motorist under the Federal Tort Claims Act, it is tersely observed that the entire doctrine of subrogation "is enforced for the purpose of accomplishing substantial justice." Comparably when the *Bethlehem National Bank* case was at District Court level (33 F. Supp. 722), it was stated that the doctrine of equitable subrogation is an appropriate means of preventing unjust enrichment.

The doctrine has application here and it is respectfully submitted the Court of Appeals was in error in disregarding it. The Authority having already paid the Edlins for the building destroyed by fire, any concept of equity and justice would demand that the Authority have a right of equitable subrogation against the insurance proceeds. If the Edlins are permitted to keep both the compensation paid by the Authority for the property and the insurance proceeds for its destruction, they shall have been unjustly enriched at the expense of the Authority. Or, more real-

istically, the Edlins will be permitted the windfall of double-recovery at the expense of the public, inasmuch as the Authority is but a municipal corporation which constructs its projects, including the project in the present case, with funds furnished by the Federal government. While this diversity case is governed by Illinois law, that state follows the usual principles of equitable subrogation and the Court of Appeals cites no case compelling award of this windfall to the Edlins.

2. In denying the Authority the protection of equity, and thus permitting the unjust enrichment of the Edlins, the opinion of the Court of Appeals (269 F. 2d 159 at 163) states in substance: (1) That the right of the Edlins to recover against the insurers was based on insurance contracts which never became the property of the Authority; (2) That the Authority might have protected itself against a fire loss by insuring "whatever interest" it acquired by the filing of a condemnation proceeding; (3) That the Authority had a right to abandon the proceeding and failed to do so; and (4) by way of footnote, that the Authority might have acquired, by eminent domain, the Edlins' interest in outstanding fire policies. None of these propositions were ever raised in defense to the Authority's claim and your Petitioner respectfully submits that, individually or collectively, they do not justify a disregard of the equitable principles which prevent unjust enrichment. Moreover, there appears to be no justification for requiring innovations and complicated procedures suggested by the Court of Appeals to avoid the plainly wrong result rather than the direct subrogation remedy to achieve that end.

As to the first point, leading authorities consistently hold that subrogation is not simply a matter of contract but is one of equitable right. *Cherry* v. *Aetna Casualty & Surety Co.*, 372 Ill. 534; *In re Lawyers Title & Guaranty Co.*, 50 N.Y.S. 2d 257; *Wojciak* v. *United States*, 74 F. Supp.

914; 50 Am. Jur., Subrogation, sec. 8; 83 C.J.S. Subrogation, sec. 3b. In the authority last cited it is said: "The right of legal subrogation is not dependent upon privity nor is it founded on, or dependent on contract or the absence of a contract, but is independent of any contractual relation between the parties." It is, rather, an equitable principle though which the benefit of remedies is obtained and, as stated in *American Surety Co. of New York* v. *Bethlehem National Bank*, 33 F. Supp. 722, is an appropriate means of preventing unjust enrichment. Accordingly, the Authority's right to relief by ways of equitable subrogation is in no manner dependent upon a contractual relation with the Edlins, or the insurers, as the Courts opinion implies.

Nor does the suggestion that the Authority might have insured "whatever interest it acquired by the filing of the condemnation proceeding" find support in the law, particularly since we are not concerned here with a "quick taking" of land whereby a condemnor may take and use the land prior to a judicial determination of its value. Speaking in *Mills* v. *Forest Preserve District*, 345 Ill. 503, 509, the Supreme Court of Illinois has said: "Even the filing of a petition for condemnation gives no more interest in land than negotiations for its purchase. Both are methods of procuring title and neither gives any interest in the land until completed." What then is the interest which the Authority might have insured? It had no title, and acquired none until the proceeding was completed, thus the only interest it could have had upon the filing of its petition was a mere expectancy of title. When the Edlins filed a motion to dismiss the condemnation proceeding in the County Court, such expectancy was further conditioned upon the ability of the Authority to establish its right to condemnation, i.e., that the public need for slum clearance and more adequate housing in fact existed. In

order for an insurance contract to be valid and not an illegal wager, the insured must have a real insurable interest in the subject of the insurance. (*Nash-Wright Co.* v. *Wright*, 156 Ill. App. 243.) Here, until the hearings on the condemnation petition were concluded, and the rights of the Authority established, it had no real insurable interest in the Edlin property. Again, even if it could be said that some insurable interest existed for the Authority, such fact would not justify a result which permits the Edlins to retain the insurance proceeds on buildings purchased from them by the Authority and to become unjustly enriched to that extent.

The next ground upon which the opinion of the Court of Appeals bases its refusal of equitable relief is that the Authority, by virtue of Section 10 of the Illinois Eminent Domain Act (Ill. Rev. Stat. 1951, chap. 47, par. 10; see: Appendix C, *infra*, p. 22), had a right to abandon the proceeding after the fire. While it may be conceded that the statute is held to generally confer such right (see: *Commissioners of Lincoln Park* v. *Schmidt*, 386 Ill. 550), it is another question as to whether a condemnor is always at liberty to exercise the right.

In the instant case the condemnor-Authority was a municipal corporation created under the provisions of the Illinois Housing Authorities Act. (Ill. Rev. Stat. 1951, chap. 67½, pars. 1 through 27e.) Being a creature of statute its rights and duties were limited by the statute creating it. Section 8 of the Act (see: Appendix C, *infra*, pp. 24-25) grants an Authority the power to acquire property in many ways, one method being by eminent domain. Such power is not unlimited, however, but is subordinate to the provisions of Section 1 of the Act (see: Appendix C, *infra*, p. 24) which limits an Authority to purposes of engaging in low-rent housing and slum clearance projects and then only when necessary for the promotion and protection of

public health, safety, morals and welfare. The same section concludes with a legislative determination that a crucial housing shortage prevails in the State which has and will materially contribute to crime, juvenile delinquency, infant mortality and disease, and that the provisions of the Act "are grounded in public necessity and predicated upon serious emergency conditions requiring immediate consideration."

Section 10 of the Eminent Domain Act, which permits a condemnor to dismiss its petition, must be read *in pari materia* with those statutes which confer the right of eminent domain upon the condemnor. When this is done, and when it is further considered that an Authority can only enter into a project when the public health, safety and welfare demands, it becomes apparent that an Authority has little or no discretion to abandon a project required by public necessity. Its very right to acquire land by eminent domain is predicated upon public need and emergency conditions, and under such compulsions it would have no liberty to abandon a proceeding to acquire property necessary to alleviate the public need and emergency. These same circumstances, together with the Illinois law which fixes the value of land taken as of the day the condemnation petition is filed, made it incumbent upon the Authority to pay the Edlins the full amount of the compensation awarded even though the building has been destroyed. In the instant case slum clearance, as well as the providing of adequate housing, was the public purpose which authorized the Authority to employ eminent domain. Indeed, the trial court in the condemnation suit so held when the Edlins contended that slum clearance was not involved. The Edlin property was an integral part of the slum area which created public evils of disease, crime and delinquency. Without such property, the public purpose would have been defeated in whole or in part, and the

emergency conditions which necessitated condemnation would continue to exist. For these reasons the Authority was not at liberty to abandon the proceeding against the Edlin property.

Moreover, a naked reliance on the general right to dismiss given by Section 10 does not take into consideration other practical aspects of which this Court may take judicial notice. The Edlin property was not the only property involved in the project. Much of the surrounding land had already been purchased or condemned, and Federal approval and funds for the project were predicated on plans which included the Edlin property. To have abandoned the project, merely because there was a change in the condition of the Edlin property, would have resulted in a needless waste of public funds already expended and a possible loss of Federal aid. To have delayed the project would have put construction contracts in jeopardy and would have continued unnecessarily the emergency conditions the project was intended to alleviate. To abandon the proceeding and continue the project with a part of the slum property sought to be condemned standing in the midst of a modern housing facility would have been absurd. The duress and compulsion of such circumstances, apart from the emergency conditions of public health and safety involved, do not admit of a conclusion that the Authority was free to dismiss its proceeding.

By a footnote the opinion of the Court of Appeals suggests the Authority might have protected itself against loss by condemning the Edlins' interest in outstanding fire policies although recognizing doubt "whether or not this was legally possible." Section 8 of the Illinois Housing Authorities Act, cited by the Court, gives no express power to acquire such interests by eminent domain. All that is given rather is a power to acquire by eminent domain "any property, real or personal, or any interest therein." A fire

insurance policy is neither real nor personal property, nor an interest therein. Such a policy is, rather, as the Court's opinion recognizes in permitting the Edlins to recover, a mere agreement which creates personal rights in the Edlins. Being personal in character, such rights do not run with the land. More important, however, by no rule of law or logic may such intangibles as contract rights, or choses in action based on contract rights, be said to be real or personal property, or an interest therein, within the meaning of section 8. Having been given no power to obtain such personal contract rights by eminent domain, it should follow that the Authority should be neither penalized nor criticized for failing to exert a power that did not exist.

3. Closely related to the principles of equity and good conscience which allow equitable subrogation to the Authority, are considerations of public policy and public morals. These considerations in turn could affect the administration and expenditure of public funds at all levels of government which exercise the power of eminent domain. The present opinion of the Court of Appeals, being totally devoid of equitable considerations, stands as an open invitation to the unscrupulous condemnee of the future to attempt double-recovery by the secret and illegal destruction of his property once a petition for condemnation has been filed against it. Under no concept of sound public policy and morals should such a situation be created by judicial sanction. For this added reason, it is manifest that the facts of the case present a situation where the broad principles attendant to the doctrine of equitable subrogation should be applied, and a situation where the opinion of the Court of Appeals should not be permitted to stand.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully,

JAMES T. MCNELIS,
412 Fifth St., N. W.,
Washington, D. C.

NOVEMBER, 1959.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1958 APRIL SESSION, 1959

JUNE 4, 1959

No. 12308

MAX EDLIN AND IDA EDLIN, *Plaintiffs-Appellants*,

v.

SECURITY INSURANCE COMPANY, et al., corporations, *Defendants-Appellees*

No. 12309.

PEORIA HOUSING AUTHORITY, *Intervening Petitioner-Appellant*,

v.

SECURITY INSURANCE COMPANY, et al., corporations, *Defendants-Appellees*

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

Before FINNEGAN,[1] SCHNACKENBERG, and HASTINGS, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. These appeals, by Max Edlin and Ida Edlin (plaintiffs below), and Peoria Housing Authority, a municipal corporation of Illinois (herein called the Authority), respectively, were heard together in this court. The defendants in both cases are the following insurance companies: Security Insurance Company, Philadelphia Fire and Marine Insurance Company, The Home Insurance Company, The Standard Fire Insurance

[1] Judge Finnegan died before this opinion was prepared.

Company and Milwaukee Mechanics' Insurance Company (herein referred to as insurers). In No. 12309, Max Edlin and Ida Edlin are also named as defendants.

We now state the relevant facts as they appear in the Edlins' complaint and insurers' answer.

The Edlins were on September 3, 1952 the owners of a building in Peoria, Illinois, and the real estate upon which it was located. On that date the Authority, pursuant to the Illinois law of eminent domain, filed in the county court at Peoria a petition to condemn said property, making the Edlins parties defendant thereto.

Prior to September 3, 1952, the insurers issued their respective fire insurance policies to the Edlins covering said building. On November 28, 1952 and while said policies were in effect, a fire totally destroyed said building, the loss sustained amounting to more than the aggregate sums of all of said policies.

The value of said premises was, for the purpose of the condemnation suit, determined at a trial in said county court, commencing on January 6, 1953 and culminating in an order on January 20, 1953 fixing $43,500 as the fair cash market value of said premises, at its highest and best use, as of September 3, 1952. The Authority immediately caused said amount to be paid to the Edlins, which was accepted by them.

The insurers' answer to the Edlins' complaint averred, *inter alia*, that the Edlins sustained no pecuniary loss or damage by reason of the fire, because of the condemnation proceedings and the payment of said sum of $43,500 by the Authority to the Edlins.

On July 1, 1954, the Authority filed a complaint as intervenor, seeking a determination that the insurance proceeds be held for its use.

On October 7, 1957, the insurers made a motion for judgment in their favor upon the pleadings[2] upon the ground that the Edlins, "having sustained no pecuniary loss by reason of the fire", are not entitled to recover under the policies of insurance sued upon. The district court, in its opinion, sustained this motion, 160 F. Supp. 487, and

[2] See 28 U.S.C.A. rule 12 (c).

entered an order to that effect, from which order the Edlins have appealed.[3]

The substantive law of Illinois applies to this case.

The Edlins contend that they did suffer a loss under the policies issued to them by the insurers. On the other hand, the insurers take this position:

> A contract of fire insurance is a contract of indemnity and where, as in the instant case, the insured has sustained no pecuniary loss by reason of the fire, he is entitled to no recovery under the policy of insurance sued upon. The Edlins, having been paid the full value of the property in question as of a date preceding the date of fire without diminution or depreciation because of damage by fire or otherwise, sustained no pecuniary or actual loss by reason of the fire and are therefore not entitled to indemnity under the policies sued upon.

Their view, they say, is based squarely upon the doctrine of indemnity. They rely on *Illinois Mutual Fire Ins. Co.* v. *The Andes Insurance Co.*, 67 Ill. 362, and several Illinois Appellate Court cases, including *Beman* v. *Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 25 N.E. (2) 603.

As to the Authority, it contends that the Edlins did suffer a loss under their policies at the time the fire occurred, and that the Authority is entitled under the doctrine of equitable subrogation to the proceeds thereof to reimburse it for money which it was required to pay, under the condemnation proceedings for the buildings as they stood before the fire.

All parties agree that the question of law involved is whether the policies "only indemnified the named insured against financial loss and that therefore the Edlins suffered no such loss, as a result of the fire, because of the later payment by Peoria Housing Authority to the Edlins of the amount so determined by virtue of the condemnation proceedings."

According to Illinois law, the value of property sought

[3] The Edlins also appealed from an order which had permitted the Authority to intervene.

to be condemned is to be determined as of the date of the filing of the petition, without regard to any increase or decrease in the value of the property between that date and the date of trial, or the date of judgment or the date of payment. *Sanitary District of Chicago* v. *Chapin*, 226 Ill. 499, 80 N.E. 1017; *City of Chicago* v. *Farwell*, 286 Ill. 415, 121 N. E. 795; *Forest Preserve District* v. *Eckhoff*, 372 Ill. 391, 24 N. E. 2d 52; and *Eckhoff* v. *Forest Preserve District*, 377 Ill. 208, 36 N. E. 2d 245.

Therefore, for the purposes of this case, we must assume that the value of the insured property was fixed by the county court as of September 3, 1952 and that the court did not take into account any decrease in value of the property by reason of the fire of November 28, 1952. Accordingly, the insurers argue that the Edlins sustained no pecuniary loss by reason of the fire and that they are therefore not entitled under the policies to any sum for the physical damage which the property sustained.

The insurers contend that the district court was correct in refusing to depart from the basic doctrine of indemnity and in refusing to allow recovery for an alleged loss which, in fact, was no loss to the Edlins, thus recognizing that a departure from the doctrine of indemnity would sanction a gambling contract and, therefore, would be against public policy.

In *First National Bank of Highland Park* v. *Boston Insurance Company, et al.*,[1] — Ill. 2d —, — N. E. 2d —, the insurers took a similar position. The court, at —, said:

> "The position of the insurers is that a contract of insurance is a personal contract of indemnity and that in no event is an insured entitled to be paid more than his actual pecuniary loss. They point out that the public policy against wagering contracts has always dictated that casualty insurance be limited to indemnity, and they urge that fire insurance must be so limited lest the lure of profit by means of insurance should increase the hazard of arson. They rely upon the clause of the policy which limits recovery to the extent of the insured's interest, and they argue that

[1] Illinois Supreme Court No. 34906, May 22, 1959.

> the insurable interest of a vendor in an executory contract for the sale of realty can not exceed the balance of the unpaid purchase price. That amount, they say, 'would fully indemnify him; more would unjustly enrich him. The argument is based in part upon the doctrine of equitable conversion: 'When a valid, enforceable contract has been entered into for the sale of real estate, as between the vendor and vendee equity regards the vendee as the owner of the land and the vendor as the owner of the purchase money, which is personalty.' *Rhodes* v. *Meredith*, 260 Ill. 138, 143."

However, the court said that there were several defects in the position of the insurers. The court pointed out that the obligation of a contract for the sale of land is not a perfect one and that the vendee may, or may not, be able to pay the purchase price.[5]

The court in the *First National Bank* case, discussed the meaning of the word "interest" in a clause in the policy which provided that the insured was not to be indemnified "in any event for more than the interest of the insured". Citing, as the leading case in Illinois, *Budelman* v. *American Insurance Co.*, 297 Ill. 222, 130 N.E. 513, the court said, at —:

> "There the insured had entered into an executory contract to sell the property on installments. The insurer contended that the policy had become void prior to the fire by reason of the change in the interest of the assured that resulted from his contract to sell. • • • 'The risk of the property remains with the title and the contract is personal with the vendor, the loss or destruction of the property falling upon him as the owner. Interest, as used in the alienation clause of this policy, means legal interest, and therefore is retained by the party holding the legal title.'"

[5] It should be noted that a condemnor, in Illinois, has a right to abandon its condemnation suit, if it will pay the costs, expenses, and reasonable attorneys' fees expended or incurred by the property owner, § 10, ch. 47, Ill. R.S. 1951, *Dept. of Public Works* v. *O'Brien*, 402 Ill. 89, 91, 83 N.E. 2d 280, 281.

In the case at bar the risk of destruction of the insured property by fire remained with the title and the contract of insurance was personal to the Edlins. Upon them the fire loss fell. At the time of the fire they, as holders of the legal title, possessed a legal interest in the property destroyed, and they became entitled to the proceeds of the policies.

We, therefore, hold that the Edlins did suffer a loss under the policies issued by the insurers, which loss amounted to more than the aggregate sums of all of said policies and that the insurers are liable to the Edlins on their policies.

This holding, however, is subject to the disposition (which we now will make) of the claim of the Authority for reimbursement for the money paid to the Edlins pursuant to the condemnation proceedings. It relies upon the doctrine of equitable subrogation which, it says, requires such payment to it "in equity and good conscience and to avoid unjust enrichment."

We cannot agree with this contention of the Authority. The right of the Edlins to recover against the insurers is contractual in its nature, based upon the policies. Those policies never became the property of the Authority. If the Authority wished to protect itself against a fire loss on the condemned premises, it might have insured whatever interest it acquired by the filing of the condemnation proceeding. Having neglected to protect itself against such a contingency, it cannot expect a court to apply the owners' fire insurance policies for the benefit of the Authority. Moreover, after the fire, the Authority had a right to abandon the proceeding, under § 10, ch. 47, R.S. Ill. 1951. This it failed to do. If it had done so, it would not be in its present situation.[6]

We hold that the Authority has no legal claim to proceeds of the policies in this case.

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[6] In addition, it might possibly have protected itself against the fire loss in this case by acquiring, by the exercise of the right of eminent domain, the Edlins' interest as insured in the outstanding policies issued by the insurers. See § 8, ch. 67½, R.S. Ill. 1951. Whether or not this was legally possible, at least it might have been explored by an alert condemnor.

For these reasons, in No. 12308, the judgment of the district court is reversed, as to the insurers, and this cause is remanded to that court for further proceeding consistent with the views herein expressed, and in No. 12309 the judgment of the district court is affirmed as to the Peoria Housing Authority, intervening petitioner.

In No. 12308, REVERSED AND REMANDED.
In No. 12309, AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12308

MAX EDLIN AND IDA EDLIN, *Plaintiffs-Appellants,*

vs.

SECURITY INSURANCE COMPANY, ET AL., *Defendants-Appellees*

Appeal from the United States District Court for the Southern District of Illinois, Northern Division

JUDGMENT June 4, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, as to the insurers, and that this cause be, and the same is hereby REMANDED to the said District Court for further proceedings consistent with the views expressed in the Opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12309

PEORIA HOUSING AUTHORITY, *Intervening Petitioner-Appellant*,

vs.

SECURITY INSURANCE COMPANY, ET AL., *Defendants-Appellees*

Appeal from the United States District Court for the Southern District of Illinois, Northern Division

JUDGMENT—June 4, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Opinion of this Court filed this day.

APPENDIX C

An Act to provide for the exercise of the right of Eminent Domain. (Approved April 10, 1872. Laws of 1871-2, p. 402.)

Sec. 1. Compensation—Jury

Be it enacted by the People of the State of Illinois, represented in the general Assembly: That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the State in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed.

Ill. Rev. Stat. 1952, chap. 47, par. 1.

* * * * *

Section 10. Judgment and Payment where no declaration of taking is filed.

Where no declaration of taking has been filed by petitioner pursuant to Section 2a of this Act, the judge or court shall, upon such report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same upon payment of full compensation as ascertained as aforesaid, within a reasonable time to be fixed by the court, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property. Where a declaration of taking has been filed in the cause the judge or court shall, upon such report, proceed in accordance with Section 2a of this Act. Provided, That in case the petitioner shall dismiss said petition before the entry of such order or shall fail to make payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and rea-

sonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of such application shall be right and just, and also for the payment of the taxable costs. 1872, April 10, Laws 1871-72, p. 402, § 10; 1897, May 14, Laws 1897, p. 217, § 1; 1947, July 21, Laws 1947, p. 905, § 1.

Ill. Rev. Stat. 1952, chap. 47, par. 10.

* * * * * *

An Act in relation to housing authorities. (Approved March 19, 1934. Laws of 1933-34, Third Special Session, p. 159)

* * * * * *

Section 2. Low cost housing, relief of housing shortage, and slum clearance declared essential to public interest.

It is hereby declared as a matter of legislative determination that in order to promote and protect the health, safety, morals and welfare of the public, it is necessary in the public interest to provide for the creation of municipal corporations to be known as housing authorities, and to confer upon and vest in said housing authorities all powers necessary or appropriate in order that they may engage in low-rent housing and slum clearance projects, and undertake such land assembly, clearance, rehabilitation, development, and redevelopment projects as will tend to relieve the shortage of decent, safe, and sanitary dwellings; and that the powers herein conferred upon the housing authorities including the power to acquire and dispose of improved or unimproved property, to remove unsanitary or substandard conditions, to construct and operate housing accommodations, to regulate the maintenance of housing projects and to borrow, expend, loan, invest, and repay monies for the purposes herein set forth, are public objects and governmental functions essential to the public interest.

It is further declared as a matter of legislative determination that the crucial housing shortage which prevails throughout the State has contributed and will continue to contribute materially toward an increase in crime, juvenile delinquency, infant mortality, and disease; that by reason thereof it has become a social and economic imperative to broaden the powers of housing authorities with respect to the acquisition of property, the construction of housing accommodations, and the assembly, clearance and sale or other disposition of property acquired for development or redevelopment by persons, firms and corporations; that the provisions of this Act are grounded in public necessity and predicated upon serious emergency conditions requiring immediate consideration and action, and that this amendatory Act embraces public objects and governmental functions essential to the public interest. 1934, March 19, Laws 1933-34, Third Sp. Sess., p. 159, § 2; 1938, July 12, Laws 1938, First Sp. Sess., p. 33, § 1; 1949, Aug. 3, Laws 1949, p. 1013, § 1.

Ill. Rev. Stat. 1951 chap. 67½ par. 2.

* * * * * *

Section 8. Powers of Authority.

An Authority shall be a municipal corporation and shall constitute a body both corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act, including the following powers in addition to others herein granted:

* * * * * *

To lease or rent any of the housing or other accommodations or any of the lands, buildings, structures, or facilities embraced in any project and to establish and revise the rents or charges therefor; to purchase, lease, obtain options upon, acquire by eminent domain

or otherwise, sell, exchange, transfer or assign, any property, real or personal, or any interest therein; to acquire any property, real or personal, or any interest therein from any firm, corporation or any municipal, State or Federal government or any agency, instrumentality or subdivision thereof by gift, grant, bequest, or devise; to own, hold, clear and improve property; in its discretion to insure or provide for the insurance of the property or operations of the Authority against such risks as the Authority may deem advisable.

Ill. Rev. Stat. 1951, chap. 67½, par. 8.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 531

PEORIA HOUSING AUTHORITY,

Petitioner,

vs.

SECURITY INSURANCE COMPANY, [illegible] AND MAX EDLIN AND IDA EDLIN,

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN E. CASSIDY, SR.
1128 Jefferson Building,
Peoria, Illinois,
Attorney for Respondents

THE SUMNER WARREN PRINTING COMPANY, CHICAGO

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No. 531.

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SECURITY INSURANCE COMPANY, ET AL., AND MAX EDLIN AND IDA EDLIN.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A of Petition) is reported at 269 F. 2d 159. The opinion of the United States District Court for the Southern District of Illinois is found at 160 F. Supp. 487.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

The "question presented" is fairly stated under that heading in the Petition.

STATUTES INVOLVED.

While there is no statute which directly controls this case the opinion of the Court of Appeals refers to Section 10, Ch. 47, Ill. R. S., 1951, and Section 8, Ch. 67½, Ill. R. S., 1951 (App. C of Petition). Additionally, Respondent will cite Section 176, Ch. 110, Ill. R. S., 1951.

STATEMENT.

Petitioner's statement fairly presents the facts necessary for a determination of this cause. In addition to the facts stated, Respondent here sets forth the undisputed fact that at the time of the fire which destroyed Edlins' building, there was pending an undisposed Motion to Dismiss the Eminent Domain proceeding in the Peoria County Court. This motion was not denied until after the fire (App. 37).

Respondent criticizes and takes issue with the argumentative portion of Petitioner's "Statement", particularly the following:

> "The Court of Appeals, without mention or consideration of the equitable principles urged upon it, permitted the Edlins to recover on the policies, * * *" (Petition, p. 4).

ARGUMENT.

The issue as to this Petitioner is singularly narrow. It presents only the question as to whether or not the Court of Appeals correctly applied the doctrine of equitable subrogation to the particular facts. No amount of argument, expansion or conclusion, can be used to broaden the issue herein presented to warrant review by this Court. In fact, Petitioner has not even attempted to set forth grounds, either express or implied, which bring this case within the language of Rule 19 of this Court.

There is no citation or statement in the petition which asserts that the instant decision is in conflict with the decision of another Court of Appeals on the same matter; nor is it claimed that the decision conflicts or offends the applicable law of the State of Illinois; nor is it urged that a question of federal law is involved; nor is it contended that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to invoke this Court's supervision. The Petition is nothing more than a restatement of the arguments presented to the Court of Appeals in Petitioner's Brief and its Petition for Rehearing. A mere claim of erroneous application of purely local rules of decision.

I.

THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

Petitioner does now and has throughout this litigation based its position generally on the principle of restitution and specifically on equitable subrogation. In its petition (p. 5) Housing quotes from 83 C. J. S., pp. 590-591. It then bases its argument on that abstract statement of law.

We quote as follows from 50 Am. Jur. 688, Subrogation, Section 10:

> "Subrogation is a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends upon the equities and attending facts and circumstances of each case. There are, however, certain elements which must be present in every case in which legal subrogation is sought. *In the first place there must be a debt or obligation for which parties other than the subrogee are primarily liable, and* which he as surety, guarantor, or in some other capacity discharges for the protection of his own rights or interests, *or* to the payment of which the funds of the person seeking subrogation have been wrongfully applied, or from the payment of which a third person receives a benefit." (Emphasis ours.)

Or, as otherwise stated, three elements *must* be present before the doctrine applies:

(a) There must be a primary debt or obligation, and

(b) Said obligation must be paid by a person other than the original obligor, and

(c) The person so paying must do so in a capacity other than as a volunteer.

The facts in this case clearly indicate that Petitioner fails to meet any of the conditions. The only obligation created by the fire was on the Insurance Companies; the amount of the jury's condemnation award would have been the same regardless of the fire. Housing was not in any worse position by reason of the fire than it would have been had the fire not occurred. It is undisputed that what Petitioner wanted was Respondents' land and not their buildings. In fact, it can be inferred from the record that Housing gained to the extent that it saved razing costs to the extent of destruction by fire.

In the "Statement" mild objection was made to that

argumentive portion of the Statement in the Petition to the effect that the Court of Appeals gave no consideration to the equitable principles raised. The reference in the opinion

> "Moreover, after the fire, the Authority had a right to abandon the proceeding, under § 10, Ch. 47, R. S. Ill. 1951. This it failed to do. If it had done so, it would not be in its present situation." (App. A of Petition, p. 19.)

necessarily refers to that principle of subrogation which requires that he who seeks subrogation must have acted other than as a volunteer. Reference to Illinois Statutory procedure in this respect came up in the oral arguments in the Court of Appeals. At that time counsel for the Respondent suggested that under applicable Illinois procedure Petitioner could, immediately after the fire, have moved for dismissal of the cause, without prejudice, and re-filed its complaint, thereby establishing a new valuation date and that failure to do so was some evidence that it *voluntarily* established its own valuation date prior to the fire. During Petitioner's time for oral argument, Judge Schnackenberg, who wrote the opinion in this case, asked counsel if this could not have been done. Counsel then, as now urged in this petition, argued that a great many tracts were involved and that the expense of such a procedure would have been prohibitive. Upon further questioning by the Court, it was conceded that in all probability dismissal could have been had as to Respondents' tract only. Though this colloquy probably does not appear in the record now before this Court, Petitioner's counsel at that time (not the same attorney as on this Petition) would have to concede these facts. Respondents bring this out because it is necessary to meet the inferential argument that the Court of Appeals gave no consideration to equit-

able principles and also as stated on page 7 of the Petition that:

> "None of those propositions were ever raised in defense to the Authority's claim. * * *"

Petitioner at pages 9, 10, 11 and 12 of its Petition seems to be confusing the legal effect of a voluntary dismissal before verdict and an abandonment of the proceeding after verdict. It indicates that had it abandoned the proceedings, it would be barred from further proceedings, thereby dissipating public funds. Perhaps this would be the case had it waited until after the jury verdict. However, a voluntary dismissal without prejudice, as to the Edlin tract only, after the fire but before verdict would not have prevented the commencement of a new action. This right is conferred by Sec. 10, Chap. 47, Illinois Revised Statutes 1951 (cited by the Court in its opinion) and also by Sec. 176, Chap. 110, Illinois Revised Statutes 1951, to-wit:

> "The plaintiff may at any time before trial, or hearing begins, upon notice to the defendant or his attorney, and on the payment of costs, dismiss his action or any part thereof as to such defendant, without prejudice, by order filed in the cause."

II.

THERE IS NO IMPORTANT QUESTION INVOLVED.

In an address by Chief Justice Vinson before the American Bar Association, on September 7, 1949, reported in the St. Louis Daily Record (Sept. 8, 1949, p. 1), he in part said:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. * * * If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is

> erroneous, we could not fulfill the constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

Petitioner suggests that considerations of public policy and public morals are involved which could affect the administration and expenditure of public funds at all levels of government. This, of course, is the familiar argument of "if this decision is correct, see where it might lead". In this case the argument is based upon a dangerous and fallacious presumption: *viz.*, that property owner citizen of these United States is feloniously inclined, cloaked in moral turpitude, and lean toward that which is dishonest rather than that which is honest.

Even if we do consist of a citizenry of arsonists, the argument fails. This case is unique and singular in its fact situation as well as in the rule of law in Illinois that requires valuation in Eminent Domain proceedings as of the date of filing the petition rather than as of the date of trial. There has not been cited by any party to this litigation at any stage of the proceeding a single case analogous on its facts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

John E. Cassidy, Sr.
1128 Jefferson Building,
Peoria, Illinois,
Attorney for Respondent

December 1959.